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3 UNITED STATES DISTRICT COURT  
4 DISTRICT OF NEVADA

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6 UNITED STATES OF AMERICA,  
7 Plaintiff,  
8 v.  
9 ALBERT LOPEZ, et al.,  
10 Defendants.  
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Case No. 2:16-cr-00265-GMN-CWH

**ORDER**

12 Presently before the court is defendant Albert Lopez's motion to exclude expert testimony  
13 for failure to comply with the court's deadline (ECF No. 1532), filed on March 3, 2019. The  
14 government filed a response (ECF No. 1544) on March 16, 2019, and Lopez filed a reply (ECF  
15 No. 1549) on March 24, 2019.

16 On June 14, 2017, a Superseding Criminal Indictment was filed charging defendant Albert  
17 Lopez with Conspiracy to Participate in a Racketeering Enterprise, in violation of Title 18, United  
18 States Code, Section 1962(d) (Count One); Violent Crime in Aid of Racketeering - Murder, in  
19 violation of Title 18, United States Code, Section 1959(a)(1) (Count Two); and Using and  
20 Carrying a Firearm During and in Relation to a Crime of Violence, Causing Death, in violation of  
21 Title 18, United States Code, Sections 924(j)(1) and 2 (Count Three). (Superseding Indictment  
22 (ECF No. 13).) The charges arise from allegations that Lopez and his twenty-two codefendants  
23 are members of the Vagos Outlaw Motorcycle Gang and engaged in a variety of criminal activity.  
24 (*Id.*)

25 In response to Lopez's previous motion for early disclosure of any gang experts the  
26 government intends to call at trial, the court ordered disclosure to the extent required by Rule  
27 16(a)(1)(G). (*See* Mot. for Notice of Expert Testimony (ECF No. 869); *see also* Order (ECF No.  
28 1382).) Those disclosures were provided on February 15, 2019. (Notice of Intent (ECF Nos.

1 1499-1503).) The second amended scheduling order provides that notice of experts were due for  
2 group 1 defendants on February 15, 2019. (Seconded Amended Scheduling Order (ECF No.  
3 1453).) Trial is to commence for group 1 defendants on July 29, 2019. (*Id.*)

4 Lopez argues that the disclosures are deficient because they lack opinions, bases, or  
5 summaries. Instead, they vaguely list topics of testimony, requiring him to guess as to the  
6 opinions to be presented, and thus, making it impossible to challenge the testimony or prepare  
7 cross-examination. He therefore moves for exclusion or in the alternative, for the government to  
8 provide sufficient notice. Additionally, he lists a variety of additional requests regarding the  
9 expert testimony. The government responds that its disclosures are sufficient, but provides  
10 additional information to assist the defense, and to cure any perceived deficiency, for example, by  
11 identifying code words to be explained.

12 Federal Rule of Criminal Procedure 16(a)(1)(G) provides that, upon a defendant's request,  
13 the government must provide the expert's qualifications, a written summary of their expected  
14 testimony, including their opinions, and the bases and reasons for those opinions. *See* Fed. R.  
15 Crim. P. 16(a)(1)(G). The purpose of requiring disclosure of an expert's qualifications is to  
16 provide information to the defendant in order to determine whether the expert qualifies under  
17 Federal Rule of Evidence 702. *See* Fed. R. Crim. P. 16(a)(1)(G) advisory committee's note to  
18 1993 amendment. A written summary of the expert's anticipated testimony provides for more  
19 complete pretrial preparation for the requesting party. *See id.* Finally, the bases and reasons for  
20 the anticipated opinions provides a requesting party the ability to gauge whether the purported  
21 bases and reasons for an opinion are admissible under Federal Rules of Evidence 703. *See id.*

22 Here, there is no dispute that the government has satisfied the requirement of providing  
23 the expert's qualifications. At issue is whether the government has provided a written summary  
24 of their expected testimony, including their opinions, and the bases and reasons for those  
25 opinions.

26 The government divides the five experts at issue into two groups. First, Special Agent  
27 Carr, Mr. Skelton, and Investigator Grimm are experts on outlaw motorcycle clubs generally and  
28 the Vagos specifically. The disclosure for each expert is identical, except as noted:

1 Pursuant to Rule 702 of the Federal Rules of Evidence, the Government intends to  
2 call [SA Carr/Skelton/Grimm] to provide expert testimony regarding the  
3 background, structure, and nature of outlaw motorcycle clubs generally, and the  
4 Vagos Outlaw Motorcycle Club specifically, to include the terminology, symbols,  
5 patches, bylaws, rules, memberships, purposes, practices, leadership roles and  
6 duties, associated and rival organizations, and the *modus operandi* of such  
7 organizations. [SA Carr's/Skelton/Grimm] testimony regarding *modus operandi*  
8 will include expert opinion regarding the interactions between Vagos members  
9 within the organization as well as with those outside the organization, to include  
10 citizens, other outlaw motorcycle club members, and law enforcement. [SA  
11 Carr/Skelton/Grimm] is also expected to testify as an expert regarding the  
12 interpretation and meaning of code words and cryptic conversations contained on  
the recordings of intercepted communications which will be introduced at trial.  
The scope of the expert testimony may also be dictated, in part, by the defenses  
raised through the defense opening statements, cross-examination of government  
witnesses, and possible defense witnesses. The scope of [SA  
Carr's/Skelton/Grimm] expert testimony will include, but is not limited to,  
paragraphs 1 and 2 of the Superseding Indictment, which are incorporated here by  
reference. See ECF No. 13, ¶¶ 1, 2.

13 (See Notice of Intent (ECF Nos. 1501-03).) The disclosures for Special Agent Carr and Mr.  
14 Skelton include this additional language:

15 Additionally, SA Carr's expert testimony in this case will include, but is not  
16 limited to, the subject matters included in his testimony in *State of Nevada v.*  
17 *Steven Carr et al.*, Case No. 11BGJ121A-E, which has been produced at Bates  
USA0116472.

18 Additionally, Mr. Skelton's expert testimony in this case will include, but is not  
19 limited to, the subject matters included in his testimony in *State of Nevada v.*  
20 *Ernesto Gonzalez*, Case No. CR11-1718B, which has been produced at Bates  
USA0088801, USA0089587, and USA0137748.

21 (See Notice of Intent (ECF Nos. 1501-02).)

22 Second, Special Agent Neal and Sergeant Bennett are identified as experts on code words  
23 and cryptic language used by the Vagos in intercepted calls. The disclosures for both are the  
24 same:

25 an expert witness regarding the background, structure, and nature of outlaw  
26 motorcycle clubs generally, and the Vagos Outlaw Motorcycle Club specifically,  
27 to include the terminology, symbols, patches, bylaws, rules, memberships,  
28 purposes, practices, leadership roles and duties, associated and rival  
organizations, and the *modus operandi* of such organizations pursuant to Rule 702  
of the Federal Rules of Evidence. [Sergeant Bennett/SA Neal] is trained in the  
investigation of crimes involving outlaw motorcycle organizations. [Sergeant

1 Bennett's/SA Neal] testimony regarding terminology and symbols will include  
2 expert opinion regarding the use of various code words and cryptic language used  
3 by members and associates of the Vagos organization during intercepted phone  
4 calls, and the meaning of those terms. The scope of the expert testimony may also  
5 be dictated, in part, by the defenses raised through the defense opening  
6 statements, cross-examination of government witnesses, and possible defense  
witnesses. [Sergeant Bennett's expert testimony in this case will include, but is  
not limited to, the subject matters included in his testimony in *State of Nevada v.*  
*Ernesto Gonzalez*, Case No. CR11-1718B, which has been produced at Bates  
USA0089587 and USA0137748.”]

7 (Notice of Intent (ECF Nos. 1499, 1500).)

8 Lopez argues that the disclosures provide no opinions, bases, or summaries. The  
9 government responds that the scope of the testimony for Special Agent Carr, Mr. Skelton, and  
10 Investigator Grimm is listed in the notice and specific paragraphs in the indictment which are  
11 incorporated by reference. As to the disclosures of experts Special Agent Carr, Mr. Skelton, and  
12 Investigator Grimm, the court finds that the disclosures fully set forth the scope of the experts'  
13 anticipated testimony, but fail to identify any of the experts' opinions. Review of the seven pages  
14 in the superseding indictment reveal a series of statements regarding the Vagos, for example, that  
15 they are a highly organized criminal organization which adhered to a hierarchical chain of  
16 command. (*See* Superseding Indictment (ECF No. 13) ¶ 2(c).) But the experts provide no  
17 specific opinions (or the reasons for their opinions) as to those allegations. These deficiencies  
18 leave Lopez to speculate what a particular witness will say, and they provide no explanation or  
19 justification that could be challenged during cross-examination. Nor do they allow for  
20 consideration as to admissibility under Federal Rule of Evidence 703. The government must  
21 provide more than a list of general subjects to be covered by the expert testimony. If the experts  
22 have adopted each of the allegations in the indictment as their own opinions, they have not said  
23 so, nor have they provided an explanation regarding the basis for their conclusions, as required by  
24 Rule 16(a)(1)(G).<sup>1</sup>

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28 <sup>1</sup> Because expert opinions must be identified, phrases such as, “including, but not limited to” do not  
sufficiently provide notice of opinions.

1 Similarly, regarding the disclosures of Special Agent Neal and Sergeant Bennett, whose  
2 expertise is code words and cryptic language used by the Vagos in intercepted calls, the court's  
3 conclusion is the same.<sup>2</sup> No code words are identified in the disclosure, and so no opinions are  
4 provided. In its response, the government provides a list of sixty-eight words and an explanation  
5 of the words. If the experts adopt those explanations of the words, they should say so.  
6 Additionally, although providing the transcript of prior expert testimony simplifies the  
7 defendant's task of understanding the basis for the expert's opinions, Lopez should not be  
8 required to mine the transcript for opinions that might be used in this case. The explanation for a  
9 particular opinion can be general and summary, but it must be provided.<sup>3</sup> Accordingly, the court  
10 finds that the disclosures are deficient.

11 Lopez argues in his motion that the government must disclose additional expert  
12 information, for example: transcripts of all prior testimony, whether the witness testified as a  
13 gang expert, or disclosure of specific training that supports the opinions. Lopez provides no  
14 points and authorities to justify these requests, and so the court rejects them in favor of requiring  
15 the government to fully comply with Rule 16(a)(1)(G).

16 Where the government has failed to comply with this disclosure requirement, the district  
17 court may:

- 18 (A) order that party to permit the discovery or inspection; specify its time, place, and  
19 manner; and prescribe other just terms and conditions;  
20 (B) grant a continuance;  
21 (C) prohibit that party from introducing the undisclosed evidence; or  
22 (D) enter any other order that is just under the circumstances.

23 Fed. R. Crim. P. 16(d)(2). Given the sufficient time remaining before trial, and the partial  
24 satisfaction of the disclosure requirements, the court finds it just to not exclude the government's

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25 <sup>2</sup> The court takes no position on whether an expert is needed to explain cryptic language used during a  
26 criminal enterprise. Undercover police officers interpret many such words daily.

27 <sup>3</sup> In contrast, an expert's written report in a civil case must include not only "a complete statement of all  
28 opinions the witness will express and the basis and reasons for them" and his qualifications, but also all of  
the data or other information considered in forming the opinion, all summary or supporting exhibits, and  
the compensation he was paid. Fed. R. Civ. P. 26(a)(2)(B)(i); *see also* 26(a)(2)(B)(i)-(vi).

1 experts, but rather to require the government to provide a more focused expert summary,  
2 consistent with the guidance in this order and Rule 16(a)(1)(G), no later than June 20, 2019.

3 IT IS THEREFORE ORDERED that defendant Albert Lopez's motion to exclude expert  
4 testimony (ECF No. 1532) is GRANTED in part and DENIED in part. It is granted to the extent  
5 the government must provide the appropriate notice required by Rule 16(a)(1)(G). It is denied in  
6 all other respects. The government's disclosure under Rule 16(a)(1)(G) is due no later than June  
7 20, 2019 for defendants Palafox, Lopez, Gillespie, Perez, Gonzalez, Campos, Morales, and  
8 Garcia.

9 DATED: June 6, 2019

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13 C.W. HOFFMAN, JR.  
14 UNITED STATES MAGISTRATE JUDGE  
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